

Summer 1977

Nelson v. State, 319 So. 2d 154 (Fla. 2d Dist. Ct. App. 1975)

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Recommended Citation

Randall O. Reder, *Nelson v. State*, 319 So. 2d 154 (Fla. 2d Dist. Ct. App. 1975), 5 Fla. St. U. L. Rev. 526 (2014) .
<http://ir.law.fsu.edu/lr/vol5/iss3/12>

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Constitutional Law—SEARCH AND SEIZURE—SCHOOL OFFICIALS' AUTHORITY TO SEARCH STUDENTS IS AUGMENTED BY THE *In Loco Parentis* DOCTRINE—*Nelson v. State*, 319 So. 2d 154 (Fla. 2d Dist. Ct. App. 1975).

On May 29, 1973, while looking for another student, the Dean of Boys and a teacher at Seminole High School observed defendant Nelson, an eighteen-year-old student,¹ and a friend smoking on school grounds during school hours. The two men became suspicious, and as they approached the students, the teacher detected the odor of marijuana.² The students were taken to the Dean's office and told that unless they emptied their pockets the Dean would summon school security. The defendant complied, producing a corncob pipe and some marijuana. He was subsequently charged with violation of the Florida Comprehensive Drug Abuse Law.³

The defense filed a pretrial motion to suppress the evidence, on the grounds that the search was unreasonable under the fourth amendment. When the motion was denied, the defendant pleaded *nolo contendere*, reserving the right to appeal.⁴ He was adjudicated guilty and placed on three years' probation.⁵

The Second District Court of Appeal affirmed the trial court's denial of the motion to suppress,⁶ on the argument that school officials

1. Letter from John Brook, Nelson's counsel, to Randall Reder (Jan. 20, 1977). Seminole High School is located in Clearwater, Florida.

2. *Nelson v. State*, 319 So. 2d 154, 155 (Fla. 2d Dist. Ct. App. 1975).

3. 319 So. 2d at 155. The defendant was charged with possession of drug paraphernalia, in violation of FLA. STAT. § 893.13 (1975), which provides in relevant part: "(3)(a) It is unlawful for any person: . . . 4. To possess, have under his control, or deliver any device, contrivance, instrument, or paraphernalia with the intent that said device, contrivance, instrument, or paraphernalia be used for unlawfully administering any controlled substance."

4. 319 So. 2d at 155. The Florida Supreme Court has held that a defendant may plead *nolo contendere* conditioned on reservation for appellate review, but the question to be reserved must be one of law. *State v. Ashby*, 245 So. 2d 225 (Fla. 1971); *Valdes v. State*, 323 So. 2d 690 (Fla. 3d Dist. Ct. App. 1975); *Beverly v. State*, 322 So. 2d 597 (Fla. 1st Dist. Ct. App. 1975); *Cameron v. State*, 291 So. 2d 222 (Fla. 4th Dist. Ct. App. 1974).

5. 519 So. 2d at 155-56.

6. *Id.* at 156. The defendant also attacked the lower court's ruling which excluded the testimony of the defendant's expert witnesses. The witnesses would have attempted to show that *Cannabis Sativa L.*, as defined under Florida law, was not inclusive of all forms of Cannabis, in particular that which the defendant possessed at the time of his arrest. The *Nelson* court summarily rejected the argument that the statute, by specifying only *Cannabis Sativa L.* as the substance prohibited, failed to give notice that all types of marijuana were prohibited. *Id.* The court cited *United States v. Rothberg*, 351 F. Supp. 1115 (E.D.N.Y. 1972), *aff'd* 480 F.2d 534 (2d Cir. 1973); *United States v. Henley*, 502 F.2d 585 (5th Cir. 1974); *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974). In *Rothberg*, the district court held that *Cannabis Sativa L.*, as the term was used by legislators and botanists in 1937, included all types of marijuana and that the statute

stand *in loco parentis* to students. The court determined that such a relationship justifies the application of a "reasonable suspicion" standard (a standard lower than probable cause) in determining the reasonableness of the search under the fourth amendment. Since the court found that the school officials had a "reasonable suspicion" that a crime was being committed, the search was lawful and the evidence was properly admitted.⁷ Thus *Nelson v. State* became the first Florida case to use the *in loco parentis* doctrine to set the parameters on searching students for criminal evidence.

With its talismanic invocation of the *in loco parentis* doctrine, the court sidestepped a careful consideration of issues usually pertinent to search and seizure challenges. This comment will examine and explain the fallacy of the court's reliance upon the *in loco parentis* doctrine. It will suggest an analysis of school search cases which is more in conformity with existing search and seizure law.

The issue on appeal in *Nelson* was the admissibility in a criminal trial of evidence taken from a student by a school official. Generally, evidence obtained by government agents in violation of the fourth amendment is excluded.⁸ Thus a successful challenge under the ex-

was intended to cover all types. 351 F. Supp. at 1118. *Henley and Gaines* cited *Rothberg* as authority for similar holdings.

7. 319 So. 2d at 156. Acting Chief Judge McNulty concurred in the result only.

8. The exclusionary rule developed as a means of effectuating fourth amendment guarantees. By excluding evidence seized in violation of constitutional rights, courts hope to deter such violations and "'compel respect for the constitutional guaranty.'" *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). Originally the rule, first enunciated by the United States Supreme Court in *Weeks v. United States*, 232 U.S. 383 (1914), only applied to evidence obtained by federal agents. 232 U.S. at 398. Later it was extended to evidence in federal criminal prosecutions which had been obtained illegally by state law enforcement officers. *Elkins v. United States*, 364 U.S. at 223. In *Mapp*, the Supreme Court held that the rule was applicable to state criminal prosecutions through the fourteenth amendment. 367 U.S. at 657.

FLA. CONST. art. 1, § 12 provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

The final sentence of § 12 was not added until the 1968 revision of the Florida Constitution; prior to 1968, however, Florida courts had read it into the state constitution. See, e.g., *Sing v. Wainwright*, 148 So. 2d 19 (Fla. 1962); *Chacon v. State*, 102 So. 2d 578 (Fla. 1958); *Thurman v. State*, 156 So. 484 (Fla. 1934). But the exclusionary provision conflicts with another policy consideration: courts should have access to all the available evidence. The final result of the rule's application is that the criminal goes

clusionary rule must show both government action (direct or a sufficient nexus therewith)⁹ and an *unreasonable* search and seizure.¹⁰ The *Nelson* court faced two issues in deciding the applicability of the exclusionary rule: first, whether the fourth amendment applies to school officials (government action), and second, whether the search was reasonable.

A close reading of the *Nelson* opinion yields the conclusion that the court begged the question of fourth amendment applicability by virtue of government action. The court's attempt to justify the reasonableness of the search suggests that they implicitly recognized a governmental nexus.¹¹ But the evidence would have been admissible had the court found school officials to be private citizens.¹² Thus, even if the court had drawn the conclusion that school officials were *not* government agents, the end result might still have been the same.¹³

free because of the constable's blunder. *See, e.g.,* *Irvine v. California*, 347 U.S. 128 (1954); *People v. Defore*, 150 N.E. 585 (N.Y. 1926) (Cardozo, J.). There is considerable debate whether the rule serves its function. Many commentators, in light of some empirical studies, believe that deterrence is not being accomplished and suggest other alternatives. *See, e.g.,* Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative?* L.A.B. BULL. 91 (1972); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeal Board*, 30 WASH. & LEE L. REV. 223 (1973); Spiotta, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

9. *Lustig v. United States*, 338 U.S. 74, 79 (1948); *United States v. Clegg*, 509 F.2d 605, 609 (5th Cir. 1975); *United States v. Mekjian*, 505 F.2d 1320, 1327-28 (5th Cir. 1975); *State v. Birdwell*, 492 P.2d 249 (Wash. 1972).

10. *Camara v. Municipal Ct.*, 387 U.S. 523 (1967).

11. 319 So. 2d at 156.

12. *Burdeau v. McDowell*, 256 U.S. 465 (1921):

The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.

Id. at 475.

For Florida cases applying this principle, see *Sheff v. State*, 329 So. 2d 270 (Fla. 1976) (maid found drugs in motel room); *Bernovich v. State*, 272 So. 2d 505 (Fla. 1973) (evidence found by father-in-law); *McDaniel v. State*, 301 So. 2d 141 (Fla. 1st Dist. Ct. App. 1974) (defendant's brother broke into house); *State v. Bookout*, 281 So. 2d 215 (Fla. 4th Dist. Ct. App. 1973) (airline employee searched unlocked suitcase to ascertain owner). *But see* *State v. Williams*, 297 So. 2d 52 (Fla. 2d Dist. Ct. App. 1974) (uniformed policeman hired to work on off-duty hours acted as officer of the city).

13. Some jurisdictions hold that school officials are not government agents. *E.g., In re Donaldson*, 75 Cal. Rptr. 220, 222 (Ct. App. 1969) ("We find the vice principal of the high school not to be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures."); *Commonwealth v. Dingfelt*, 323 A.2d 145, 147 (Pa. Super. Ct.

The *Nelson* court was unable to find Florida precedent for determining the reasonableness of the search. Instead, it relied heavily on *People v. Jackson*,¹⁴ a New York appellate decision which was among the first cases to define a special standard for school searches. The *Jackson* court held that a school official, though acting in the capacity of a government agent, need not meet the probable cause standard to satisfy fourth amendment requirements.¹⁵ Instead, the school official need only have "reasonable grounds for suspecting that something unlawful was being committed."¹⁶

The *Jackson* court based its less stringent "reasonable suspicion" standard on public necessity, noting that New York City high schools were threatened with "[r]ampant crime and drug abuse."¹⁷ School officials, according to the court, have the duty to protect students from these harmful activities because of their "distinct relationship"—standing *in loco parentis*.¹⁸ The court asserted that the doctrine of *in loco parentis* "is imbedded in the common law."¹⁹ Since the doctrine preceded the adoption of the Constitution, the court reasoned by extension that the fourth amendment should not handicap school officials in carrying out the duties incumbent upon being *in loco parentis*.²⁰ Accordingly, school officials are required to search for drugs, relieved

1974) ("[s]chool officials are not law officers of the government . . ."); *Mercer v. State*, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970) ("The principal in dealing with appellant acted *in loco parentis*, not for an arm of the government."). See also *State v. Young*, 216 S.E.2d 586 (Ga. 1975); Note, *The Fourth Amendment and High School Students*, 6 WILLAMETTE L.J. 567 (1970).

Other jurisdictions hold that school officials are government agents but that the fourth amendment requirements are less stringent. *E.g.*, *State v. Baccino*, 282 A.2d 869, 872 (Del. Super. Ct. 1971) ("Thus I conclude that the doctrine of *in loco parentis* . . . must be balanced against the students' Fourth Amendment rights."); *People v. Ward*, 233 N.W.2d 180, 183 (Mich. Ct. App. 1975) ("[W]e adopt a 'reasonable suspicion' standard."); *In re G.C.*, 296 A.2d 102, 107 (N.J. Juv. Dom. Rel. Ct. 1972) ("I hold . . . that the public school principal, acting as a governmental officer and under the *in loco parentis* authority, made a reasonable search and seizure."); *Doe v. State*, 540 P.2d 827, 832 (N.M. Ct. App. 1975) ("[W]e adopt the standard that school officials may conduct a search of a student's person if they have a reasonable suspicion that a crime is being or has been committed."); *People v. Jackson*, 319 N.Y.S.2d 731 (App. Term 1971).

Two cases have held that school officials are government agents subject to the probable cause requirements of the fourth amendment notwithstanding the *in loco parentis* doctrine. *State v. Mora*, 307 So. 2d 317 (La. 1975), *vacated on other grounds*, 423 U.S. 809 (1976); *State v. Walker*, 528 P.2d 113 (Ore. App. 1974).

14. 319 N.Y.S.2d 731 (App. Term 1971).

15. *Id.* at 736. See also *State v. McKinnon*, 558 P.2d 781, 784 (Wash. 1977).

16. 319 N.Y.S.2d at 736.

17. *Id.*

18. *Id.* at 733.

19. *Id.* at 734.

20. *Id.* at 735-36.

of the stringent probable cause standard.²¹ The search merely must not be arbitrary.²²

The *Nelson* court adopted the New York court's rationale. Quoting *Jackson*, the court stated: "The *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including a search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable."²³ The *Nelson* court further stated that the reasonable suspicion standard would adequately safeguard students' constitutional right to be protected from unlawful search and seizure.²⁴

In reaching their decisions, the *Nelson* and *Jackson* courts misapplied the *in loco parentis* concept as it existed in common law. The *in loco parentis* doctrine was originally based on two premises: (1) the parent had specifically delegated his authority to the teacher, and (2) the authority so delegated pertained only to restraint and correction.²⁵ By the nineteenth century, the doctrine was firmly established and was applied even though parents no longer specifically delegated their authority.²⁶ Gradually, the doctrine was expanded to validate regulations enacted to protect student morals, welfare, and safety.²⁷ The teacher, however, did not completely possess a parent's authority.²⁸

21. *Id.* at 736.

22. *Id.*

23. 319 So. 2d at 156, quoting 319 N.Y.S.2d at 736.

24. 319 So. 2d at 156.

25. These requirements were established at common law and mentioned by Blackstone.

[The parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. BLACKSTONE, COMMENTARIES *453. See E. BOLMEIER, LEGALITY OF STUDENT DISCIPLINARY PRACTICES 9 (1976).

26. For a broad historical analysis of the *in loco parentis* doctrine, see Mawdsley, *In Loco Parentis: A Balancing of Interest*, 61 ILL. B.J. 638 (1973); Note, *In Loco Parentis and Due Process: Should These Doctrines Apply to Corporal Punishment?*, 26 BAYLOR L. REV. 678 (1974).

27. Mawdsley, *supra* note 26, at 638. See generally *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (C.D. Cal. 1969); *Patterson v. Nutter*, 7 A. 273 (Me. 1886); *Richardson v. Braham*, 249 N.W. 557 (Neb. 1933).

28. *Guerrieri v. Tyson*, 24 A.2d 468 (Pa. 1942):

Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline [citation omitted] but there is no implied delegation of authority to exercise her lay judgment, as a parent may, in the matter of the treatment of injury or disease suffered by a pupil.

Id. at 469.

See generally *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972); *Gaincott v. Davis*, 275 N.W. 229 (Mich. 1937); E. BOLMEIER, *supra* note 25, at 12-14.

Until 1969, the doctrine had never been applied to matters of criminal import.²⁹ *Nelson* and *Jackson* ignored the doctrine's original limitations and applied *in loco parentis* in a manner not recognized in common law.³⁰

Using the *in loco parentis* doctrine as a basis for student searches disregards the history of the doctrine and is in direct conflict with its underlying theory. To stand "in the place of a parent"³¹ implies that one is to look after the child's best interest in the same manner as a parent. It is unlikely that most parents would believe it to be in the best interest of the child to search him for drugs to use against him in a criminal trial.³² Most parents probably do not believe that a criminal conviction or determination of delinquency benefits a child and would rather seek other remedies. Additionally, it cannot be assumed that a parent would voluntarily provide the police with drugs obtained from their children.³³ Actually, the converse is true: most parents would probably elect not to turn their children in. But the facts in *Nelson* suggest that school officials may not feel so constrained.³⁴ This is a patent example of the inappropriateness of *in loco parentis* as applied in student search cases. The ultimate irony, of course, is that the *Nelson* court chose to apply the doctrine to this particular defendant, who at age eighteen had attained majority.³⁵

29. *In re Donaldson*, 75 Cal. Rptr. 220 (Ct. App. 1969).

30. See also Note, *In Loco Parentis: Definition, Application, and Implication*, 23 S.C. L. REV. 114 (1971).

31. BLACK'S LAW DICTIONARY 896 (4th ed. 1968).

32. The state argued in *Gault* that the *parens patriae* doctrine justified its differential treatment of juveniles. Simply stated, *parens patriae* means the state is acting *in loco parentis* to the juvenile. *Nelson* presents the same argument, only with reference to a state official instead of the state. The Supreme Court countered the argument by noting that the doctrine ultimately confronts the reality of a boy "committed to an institution where he may be restrained of liberty for years." *In re Gault*, 387 U.S. 1, 27 (1966).

33. "One of the things that makes *in loco parentis* such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power." Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974). See generally F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 16-18 (1964); E. BOLMEIER, *supra* note 25, at 29-35 (1976); S. DAVIS, *RIGHTS OF JUVENILES* 63 (1974).

34. See 319 So. 2d at 155.

35. Most secondary school students are under eighteen and therefore subject to trial as juveniles. FLA. STAT. § 39.02(1) (1975). The analysis employed in this comment is applicable to juvenile trials as well as adult trials like that experienced by defendant *Nelson*. In a case not dealing with search and seizure, the Fifth Circuit has held the fourth amendment applicable to juvenile courts. *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976). With regard to Florida rules governing juvenile courts, see generally FLA. R. JUV. P. 8.180(a) ("In all cases involving delinquency and/or child in need of supervision, the Florida Rules of Criminal Procedure shall apply when not in conflict with these rules.") and FLA. R. CRIM. P. 3.190(h) (governing motions to suppress).

A proper analysis of search and seizure questions in the context of the school environment must first determine the status of school officials. In holding that a school board violated students' first amendment rights, the Supreme Court has stated: "The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."³⁶ As employees of the board of education,³⁷ school officials are state agents.³⁸ The fourth amendment applies to state agents who conduct searches, regardless of the purpose of the search.³⁹ Therefore it is not necessary to conclude that school officials are law enforcement officers in order to apply the fourth amendment.⁴⁰ It is sufficient to show that they are state employees acting within the scope of their employment.

The next step is a determination of those factors which define the reasonableness of the search. As a general rule, a search may be conducted only on a showing of probable cause,⁴¹ and with certain exceptions, a warrant for the search must be obtained from an impartial magistrate.⁴² There must be compelling reasons for an exception to the warrant requirement,⁴³ and the state has the burden of proving that such compelling reasons exist.⁴⁴

36. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). See Donoghoe, *Emerging First and Fourth Amendment Rights of the Student*, 1 J.L. & Educ. 449, 450 (1972).

37. FLA. STAT. § 230.23(5) (1975).

38. *But see* note 13 *supra*.

39. *See, e.g., Camara v. Municipal Ct.*, 387 U.S. 523 (1967). *Camara* stands for the broad proposition that the fourth amendment applies to all searches, even those where criminal evidence is not being sought. But, "none of the student search cases has cited *Camara*." Buss, *supra* note 33, at 756. *See also* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011 (1973).

40. But one writer has commented that "school authorities often act in concert with local police and are, in effect, police agents." Note, *Balancing In Loco Parentis and the Constitution: Defining the Limits of Authority Over Florida's Public High School Students*, 26 U. FLA. L. REV. 271, 286 n.130 (1974). In one case the student refused to allow the school official to search his pockets. The school official called in a police officer and, in the officer's presence, searched the student. The school official found some marijuana and turned it over to the officer. *In re Fred C.* 102 Cal. Rptr. 682 (1972). *See also* Comment, *Searches by School Officials: The Diminishing Fourth Amendment*, 14 SANTA CLARA LAWYER 118 (1973).

41. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Katz v. United States*, 389 U.S. 347 (1967); Buss, *supra* note 33. *See* note 8 *supra*.

42. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

43. *McDonald v. United States*, 335 U.S. 451, 454 (1948) ("Where . . . officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant.").

44. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."); *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("[T]he burden is on those seeking the exemp-

In school search cases, the courts, though conceding the ordinarily stringent limitations on search and seizure procedures, have been notably reluctant to "engraft these very same procedures onto our school system."⁴⁵ This is even more remarkable in light of their clear recognition that exceptions to the warrant requirement have been "jealously and carefully drawn."⁴⁶ The effect has been to carve out yet another exception—unsanctioned to date by the U.S. Supreme Court. Justification is found both in the nature of school discipline,⁴⁷ and in the increasing problems of crime and drug abuse in the schools.⁴⁸

Although certain exceptions have been made for administrative searches within tightly defined statutory limitations,⁴⁹ the school environment is not clearly analogous. It takes a great leap of the imagination to conclude that students, upon entering the school grounds, voluntarily relinquish their privacy in a manner similar to a state or federally licensed firearms dealer.⁵⁰ Furthermore, one looks in vain for statutory limitations on school officials comparable to those limiting administrative inspection under, for example, the Federal Gun Control Act.⁵¹

Even assuming *arguendo* that certain relaxed standards may be justified in the interest of maintaining school discipline, it does not

tion to show the need for it"); *McDonald v. United States*, 335 U.S. 451, 456 (1948).

In Florida, the State has the burden of proving the reasonableness of a warrantless search. *Mann v. State*, 292 So. 2d 432 (Fla. 2d Dist. Ct. App. 1974). *See also* *State v. Hinton*, 305 So. 2d 804 (Fla. 4th Dist. Ct. App. 1975); *State v. Lyons*, 293 So. 2d 391 (Fla. 2d Dist. Ct. App. 1974); *Bicking v. State*, 293 So. 2d 385 (Fla. 1st Dist. Ct. App. 1974); *Ashby v. State*, 228 So. 2d 400, 407 (Fla. 2d Dist. Ct. App. 1969).

45. *Doe v. State*, 540 P.2d 827, 832 (N.M. Ct. App. 1975).

46. *Id.*

47. *State v. McKinnon*, 558 P.2d 781, 784 (Wash. 1977) (en banc, three justices dissenting).

48. *Doe v. State*, 540 P.2d 827 (N.M. Ct. App. 1975); *People v. Jackson*, 319 N.Y.S.2d 731, 736 (App. Term 1971).

49. *United States v. Biswell*, 406 U.S. 311 (1972) (firearm business); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor business). Businesses are on notice that they are subject to periodic inspection when they enter a regulated field. To insure that businessmen have adequate notice, the inspections may not proceed beyond their specific statutory authorization. 406 U.S. at 317.

The Supreme Court of Florida has strictly confined business inspections to their statutory authorization. Specifically, the court held that the authority to inspect pharmacies could not be extended to search for drugs proscribed by another statute. However, the court stated that the legislature could extend the power of warrantless search to aid in state criminal prosecution by amending the statute which regulates pharmacies. *Olson v. State*, 287 So. 2d 313 (Fla. 1973).

50. *See, e.g., United States v. Biswell*, 406 U.S. 311-15 (1972).

51. 18 U.S.C. 923(g) (1970).

follow that evidence procured thereby should be admissible in a criminal proceeding.⁵² If school officials are to act as agents of the state, then they should be held to the same standards as the state in pursuing the ends of criminal justice.⁵³

The second argument, that "rampant crime and drug abuse" constitute exigent circumstances sufficient to lower the warrant requirement, also misses the point. Exigent circumstances in the criminal setting never suffice for the wholesale abandonment of fourth amendment requirements. Exigent circumstances, rather, must be evaluated with respect to a particular person, time, and situation.⁵⁴

Should, however, the school setting be found appropriate for an exception to the warrant requirement, it does not follow that a search and seizure standard lower than probable cause is also appropriate. The three recognized exceptions to the warrant requirement—to insure compliance with a licensing regulation;⁵⁵ to protect the national boundaries;⁵⁶ and to protect a law officer or others from immediate harm⁵⁷—are inapposite here. And the court, in this writer's opinion, has failed markedly to make a case for a new exception under these circumstances. Most ironically, the facts show that no such straining for a lower standard—the "reasonable suspicion" standard—was necessary. In Florida, the smell of marijuana smoke is sufficient probable cause for a search by a police officer.⁵⁸

The *Nelson* decision applies a new standard in determining the reasonableness of school officials' searches without thoroughly evaluating whether any departure from the ordinary fourth amendment standard is necessary or constitutionally permissible. Basing its de-

52. See generally *State v. McKinnon*, 558 P.2d 781, 789 (Wash. 1977) (Rosellini, J., dissenting).

53. See *Mercer v. State*, 450 S.W.2d 715, 720-22 (Tex. Ct. App. 1970) (Hughes, J., dissenting).

54. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Sibron v. N.Y.*, 392 U.S. 40, 64 (1968); *State v. Brooks*, 281 So. 2d 55, 56 (Fla. 2d Dist. Ct. App. 1973).

55. See note 49 *supra*.

56. The Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1972), used dicta from *Carroll v. United States*, 267 U.S. 132 (1924), to support the argument that border searches are distinguishable from interior searches. *Id.* at 269. Chief Justice Taft, in *Carroll*, explained at great length the statutory history of customs searches. 267 U.S. at 150-53.

57. The Court stated that there are times when a police officer may have reason to fear for his safety without having the requisite probable cause to conduct a search. Therefore, the Court allowed a "limited search of outer clothing for weapons." *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968); see *Cady v. Dombrowski*, 413 U.S. 433 (1973).

58. See *State v. Boyle*, 326 So. 2d 225 (Fla. 2d Dist. Ct. App. 1976); *Berry v. State*, 316 So. 2d 72 (Fla. 1st Dist. Ct. App. 1975). Both cases held that the smell of marijuana smoke emanating from an automobile was sufficient probable cause for a police officer to search the car and its occupants.

cision upon an ancient doctrine, which in common law was not applied to criminal matters, the court did not undertake the evaluation necessary to determine the reasonableness of the search.

Education is fundamental to a democratic society, but it becomes vacuous if those being educated are also denied their rights. An appreciation of basic civil rights can only be learned in an environment where such rights are rigorously protected. In the words of Justice Jackson:

That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.⁵⁹

RANDALL O. REDER

Wills and Trusts—TRUST INSTRUMENT PROVIDING FOR PAYMENT OF ESTATE TAXES IS INSUFFICIENT TO AVOID APPLICATION OF FLORIDA APPORTIONMENT STATUTE, ABSENT EXPRESS PROVISION IN TESTATOR'S WILL—*Guidry v. Pinellas Central Bank and Trust Co.*, 310 So. 2d 386 (Fla. 2d Dist. Ct. App. 1975).

On May 4, 1972, Henrik Ovesen created a revocable inter vivos trust naming Pinellas Central Bank and Trust Company [hereinafter Pinellas Bank] as trustee.¹ Reserving the income to himself for life, Ovesen directed that his wife, Emilie, was to receive the income at his death. After the death of Ovesen and his wife, the trustee was to set up two trusts. From the first, Ovesen's daughter, Emilie Erslev, was to receive income for life, remainder to Mellon National Bank and Trust Company [hereinafter Mellon Bank] as trustee for a family foundation.² From the second, his granddaughter, Patricia Guidry, was to receive income for life. Upon her death both income and principal were to be distributed for her children's educational needs, if any.³ The excess was also to be distributed to the Mellon Bank for the family foundation.

59. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), *quoted in Buss, supra* note 33, at 792.

1. *Guidry v. Pinellas Central Bank and Trust Co.*, 310 So. 2d 386, 387 (Fla. 2d Dist. Ct. App. 1975).

2. *Id.*

3. *Id.* The trust provided that the trustee was "authorized to distribute income and